Chew Sang Hai v Intan Kinabalu Sdn Bhd & Ors

HIGH COURT (KOTA KINABALU) — ORIGINATING PETITION NO KK26–1 OF 2011
ABDUL RAHMAN SEBLI J
9 DECEMBER 2011

Companies and Corporations — Directors — Dealings with person connected with director — Properties disposed at undervalue to company linked to directors and majority shareholders — Whether elements of s 132E of the Companies Act 1965 satisfied — Companies Act 1965 s 132E

Companies and Corporations — Member's rights — Oppression — Petition under s 181 of the Companies Act 1965 — Whether member's interest disregarded — Whether any resolution or act that unfairly discriminated or was otherwise prejudicial to a member — Hasty disposal of company's properties at undervalued price — Properties disposed to a company linked to directors and majority shareholders — Refusal to provide petitioner with valuation report — Attempt by majority shareholders to hide a wrongdoing — Visible departure from fair dealing and violation of conditions of fairplay

Companies and Corporations — Separate legal entity — Lifting the veil of incorporation — Disposal of properties at undervalue to company linked to directors and majority shareholders — Whether respondents could hide behind corporate veil — Courts not to take narrow and legalistic view of separate personalities

The first respondent, a property development company, was 90% owned and managed by the Lim family of which the patriarch was the second respondent. The fourth to seventh respondents were the children of the second respondent. The Lim family also owned 47% of the shares in Century Leasing & Development Sdn Bhd ('CLDSB') and 100% of the shares in the third respondent company. Sometime in 2002 the petitioner was approached by the second respondent who on behalf of the first respondent company offered him to take up its shares and also to appoint him as a director. The offer was conditional upon the petitioner succeeding in assisting the first respondent company to revive a joint venture agreement entered into between Lembaga Pembangunan Perumahan Dan Bandar ('LPPB') and the first respondent company. The joint venture agreement pertained a development project which were to be constructed in three phases by the first respondent company. The petitioner succeeded in reviving the joint venture project. Thereafter the

petitioner acquired and paid for 100,000 shares in the first respondent company for the sum of RM230,000. He was also appointed as a director. The first respondent company had obtained a short term loan of RM8m from CLDSB to finance construction of phase 3 of the project. Sometime in the middle of 2010, the second respondent decided that he wanted to buy the entire phase 3 project from the first respondent company at the price of RM24m. The petitioner opposed this move as the price of RM24m represented only RM630,000 per unit of the shoplots when the market value was around RM750,000 per unit. In an apparent move to subterfuge the petitioner's intransigence, the second, third and sixth respondents held a board of directors meeting of the first respondent company on 23 September 2010. The petitioner was not present at the meeting as he was on an overseas trip. At the meeting, the respondent directors represented that they needed another RM5m loan from CLDSB as working capital, thus increasing CLDSB's loan to the first respondent company from RM8m to RM13m. The directors also resolved to propose to CLDSB to accept Blocks J, K and L of phase 3 of the project, which they valued at approximately RM13m, as settlement of the CLDSB aggregate loan of RM13m. The petitioner was not notified of this meeting. The petitioner subsequently objected to these resolutions on the grounds that: (i) the hasty disposal of the phase 3 shoplots to CLDSB at an undervalued price of RM24m was totally unjustifiable; and (ii) the disposal of the phase 3 shoplots was to CLDSB, a company linked to the directors and shareholders of the first respondent company who were interested parties and who were therefore not entitled to cast their votes without contravening the Act. The first respondent company nevertheless went ahead with an Extra Ordinary General Meeting ('the EGM') on 11 Otober 2010 and passed the resolution tabled at the board of directors meeting. The petitioner thus made this application under s 181 of the Companies Act, 1965 ('the Act') for a cancellation of all the resolutions and to compel the second, third, fourth, fifth and eighth respondents to purchase the petitioner's entire interest in the first respondent company.

Held, allowing the application with costs:

(1) Section 181 of the Act may be invoked where there is 'oppression' of a member or holder of a debenture of a company or where a member's interest is disregarded. It may also be invoked where there is a resolution or act that 'unfairly discriminates' against or is 'otherwise prejudicial' to a member (see para 21).

(2) The valuation report ('JS Valuers report') was crucial for any decision on the sale price of the three blocks of shoplots, yet it was only made available on the day of the EGM and was promptly removed after the meeting. The petitioner on five occasions asked for the report but was denied by the respondents. It was only after the petitioner's solicitor served a notice in Form 43 of the Rules of the High Court 1980 on the

respondents' solicitors that the respondents relented and the report was made available, five months after the EGM was held. This conduct on the part of the respondents was clear evidence of an attempt to hide a wrongdoing (see para 19).

(3) The circumstances under which oppression or disregard may arise are infinite. The litmus test in each case is whether there is a visible departure from fair dealing and a violation of the conditions of fairplay (see para 27), *Ng Sing King and others v PSA International Pte Ltd and others (No 2)* [2005] 2 SLR 56 referred.

(4) No notice of demand was ever issued by CLDSB for repayment of the RM13m loan. Hence, there was no urgency for the respondents to call the meeting on 23 September 2010, followed by the EGM on 11 October 2010. The meeting should have been postponed to wait for the petitioner to return from his overseas trip. The move was engineered to enable the respondents to quickly dispose off the first respondent company's assets at an undervalue without regard for the petitioner's interest (see paras 30 & 32).

(5) Being a company wholly owned by the Lim family, CLDSB would not in the ordinary course of business have called on the loan given to the first respondent, a company also almost entirely owned by the Lim family unless there was an ulterior motive (see para 33).

(6) There is a general principle of law that when unlawfulness is present, the court would be more ready to find an act prejudicial, unfair and contrary to the interest of the members. In the instant case the prohibited act was the acquisition by CLDSB of the three blocks of shoplots belonging to the first respondent company. The relevant respondents were connected to CLDSB. The company was owned by the respondents and their nuclear family. By these close ties they were clearly caught by s 132E of the Act. They should not therefore have voted at the EGM (see paras 35–36); *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489; (1993) TASSC 36 referred.

(7) The respondents and their family benefitted from the undervalued disposal of the shoplots to CLDSB. Being the majority shareholders of the first respondent company, the Lim family had the right to decide on what was best for the company but where that right was exercised oppressively or without regard for the interest of the minority shareholder the court will come to his aid (see para 40).

(8) As CLDSB was wholly owned by the respondents they could not hide behind the corporate veil. The courts do not take a narrow and legalistic view of the separate personalities involved (see para 45).

[Bahasa Malaysia summary

Responden pertama, syarikat pembangunan hartanah, dimiliki dan diuruskan 90% oleh keluarga Lim yang mana bapa mereka adalah responden kedua. Responden-responden keempat hingga ketujuh merupakan anak-anak responden kedua. Keluarga Lim memiliki 47% daripada saham dalam Century Leasing & Development Sdn Bhd ('CLDSB') dan 100% saham dalam syarikat responden ketiga. Sekitar tahun 2002 pempetisyen didatangi oleh responden kedua yang bagi pihak responden pertama telah menawarnya untuk mengambil sahamnya dan melantiknya sebagai pengarah. Tawaran itu bersyarat jika pempetisyen berjaya membantu syarikat responden pertama menjalinkan semula perjanjian usaha sama antara Lembaga Pembangunan Perumahan dan Bandar ('LPPB') dan syarikat responden pertama. Perjanjian usaha sama adalah berkaitan projek pembangunan yang akan dibangunkan dalam tiga fasa oleh syarikat responden pertama. Pempetisyen telah berjaya dalam memajukan semula projek usaha sama itu. Selepas itu pempetiyen telah memperoleh dan membayar 100,000 saham dalam syarikat responden pertama untuk jumlah RM230,000. Dia juga telah dilantik sebagai pengarah. Syarikat responden pertama telah memperoleh pinjaman jangkamasa pendek berjumlah RM8 juta daripada CLDSB untuk membiayai pembangunan fasa 3 projek itu. Sekitar pertengahan tahun 2010, responden kedua telah membuat keputusan yang dia ingin membeli keseluruhan projek fasa 3 itu daripada syarikat responden pertama pada harga RM24 juta. Pempetisyen membantah langkah ini kerana harga RM24 juta itu hanya mewakili RM630,000 seunit lot kedai walhal nilai pasaran dalam anggaran RM750,000 seunit. Dalam langkah nyata untuk menipu pempetisyen, responden-responden kedua, ketiga dan keenam telah mengadakan mesyuarat lembaga pengarah syarikat responden pertama pada 23 September 2010. Pempetisyen tidak hadir di mesyuarat itu kerana berada di luar nagara. Dalam mesyuarat itu, pengarah-pengarah responden menyampaikan bahawa mereka memerlukan pinjaman RM5 juta lagi daripada SLDSB sebagai modal kerja, yang akan menambah pinjaman CLDSB kepada syarikat responden pertama daripada RM8 juta kepada RM13 juta. Pengarah-pengarah tersebut juga memutuskan untuk mencadangkan kepada LDSB untuk menerima Blok-Blok J, K dan L kepada fasa 3 projek itu, yang mereka nilaikan beranggaran RM13 juta, sebagai penyelesaian pinjaman agregat CLDSB berjumlah RM13 juta. Pempetisyen tidak dimaklumkan tentang mesyuarat ini. Pempetisyen kemudian telah membantah terhadap resolusi-resolusi tersebut atas alasan bahawa: (i) jualan terburu-buru lot kedai fasa 3 kepada CLDSB pada harga di bawah nilai RM24 juta tidak wajar langsung; dan (ii) jualan lot kedai fasa 3 adalah kepada LDB, syarikat yang berkait dengan pengarah-pengarah dan pemegang-pemegang saham syarikat responden pertama yang merupakan pihak-phak berkepentingan dan yang mana tidak berhak untuk mengundi tanpa melanggar Akta tersebut. Syarikat responden pertama bagaimanapun meneruskan dengan mesyuarat am luar biasa ('EGM') pada 11 Oktober 2010 dan meluluskan resolusi yang

dibentangkan kepada mesyuarat lembaga pengarah. Pempetisyen dengan itu telah membuat permohonan ini di bawah s 181 Akta Syarikat 1965 ('Akta tersebut') untuk pembatalan semua resolusi dan mendesak responden-responden kedua, ketiga, keempat, kelima dan kelapan untuk membeli semua kepentingan pempetisyen dalam syarikat responden pertama.

Diputuskan, membenarkan permohonan dengan kos:

(1) Seksyen 181 Akta tersebut boleh digunakan apabila terdapat 'penindasan' ahli atau pemegang debentur syarikat atau di mana kepentingan ahli tidak dipedulikan. Ia juga boleh digunakan di mana terdapat resolusi atau tindakan yang 'unfairly criminate' terhadap atau yang 'otherwise prejudicial' kepada ahlinya (lihat perenggan 21).

(2) Laporan penilaian ('laporan Penilai-penilai JS') adalah penting untuk apa-apa keputusan tentang harga jualan tiga blok lot kedai itu, namun ia hanya dapat diperoleh pada hari EGM dan dengan segera dialih selepas mesyuarat itu. Pempetisyen telah meminta sebanyak lima kali untuk laporan itu tetapi tidak diberikan oleh responden-responden. Hanya selepas peguam pempetisyen menyerahkan notis dalam Borang 43 Kaedah-Kaedah Mahkamah Tinggi 1980 ke atas peguam responden-responden barulah responden-responden mengalah dan memberikan laporan tersebut, iaitu lima bulan selepas EGM diadakan. Perlakuan responden-responden ini adalah bukti nyata satu percubaan untuk menyembunyikan perbuatan yang salah (lihat perenggan 19).

(3) Keadaan di mana penindasan atau sikap tidak peduli boleh timbul adalah tidak terhad. Ujian litmus dalam setiap kes adalah sama ada terdapat sempadan nyata daripada urusan yang adil dan pelanggaran syarat-syarat keadilan (lihat perenggan 27); *Ng Sing King and others v PSA International Pte Ltd and others (No 2)* [2005] 2 SLR 56 dirujuk.

(4) Tiada notis tuntutan telah dikeluarkan oleh CLDSB untuk bayaran balik pinjaman RM13 juta itu. Justeru itu, tiada keperluan tindakan segera untuk responden-responden memanggil mesyuarat pada 23 September 2010, diikuti dengan EGM pada 11 Oktober 2010. Mesyuarat itu patut ditangguhkan bagi menunggu pempetisyen pulang dari luar negara. Tindakan tersebut telah dilakukan bagi membolehkan responden-responden menjual segera aset-aset syarikat responden pertama di bawah nilai tanpa mempedulikan kepentingan pempetisyen (lihat perenggan 30 & 32).

(5) Sebagai syarikat milik sepenuhnya oleh keluarga Lim, CLSB tidak akan dalam pelaksanaan perniagaan memohon pinjaman yang diberikan kepada responden pertama, sebuah syarikat juga boleh dimiliki hampir keseluruhannya oleh keluarga Lim kecuali jika terdapat motif lain (lihat perenggan 33).

(6) Terdapat prinsip undang-undang am bahawa apabila terdapat kesalahan undang-undang, mahkamah lebih daripada bersedia untuk mendapati suatu tindakan itu prejudis, tidak adil dan bercanggah dengan kepentingan ahli-ahli. Dalam kes ini tindakan yang dilarang adalah pemerolehan CLDSB terhadap tiga blok lot kedai milik syarikat responden pertama. Responden-responden yang relevan mempunyai kaitan dengan CLDSB. Syarikat tersebut dimiliki oleh responden-responden dan keluarga mereka. Melalui hubungan rapat tersebut mereka jelas terangkum di bawah s 132E Akta tersebut. Mereka dengan itu tidak boleh mengundi di EGM (lihat perenggan 35–36); *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489; (1993)TASSC 36 dirujuk.

(7) Responden-responden dan keluarga mereka mendapat manfaat daripada jualan di bawah nilai lot-lot kedai tersebut kepada CLDSB. Sebagai pemegang saham majoriti syarikat responden pertama, keluarga Lim mempunyai hak untuk memutuskan apa yang terbaik untuk syarikat tersebut tetapi di mana hak itu dilaksanakan secara menindas atau tanpa menghiraukan kepentingan pemegang saham minoriti, mahkamah akan masuk campur untuk memberi bantuan (lihat perenggan 40).

(8) Oleh kerana CLDSB dimiliki sepenuhnya oleh responden mereka tidak dapat bersembunyi di sebalik tabir korporat. Mahkamah tidak mengambil pandangan sempit dan bersifat perundangan berhubung dengan personaliti berasingan yang terlibat (lihat perenggan 45).]

Notes

For a case on dealings with person connected with director, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 214.

For cases on lifting the veil of incorporation, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 865–893.

For cases on oppression, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 551–610.

Cases referred to

Australian Securities Commission v Multiple Sclerosis Society of Tasmania (1993) 10 ACSR 489; (1993) TASSC 36, SC (refd)

Jermyn Street Turkish Baths Ltd, Re [1971] 3 All ER 184, CA (refd)

Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (refd)

Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors and other appeals [1995] 2 SLR 297, CA (refd)

Lee Mah Realty Sdn Bhd; Song Kueng Poh v Liew Chock Sang & Ors, Re [1980] 1 MLJ 115 (refd)

Lim Swee Khiang and another v Borden Co (Pte) Ltd and others [2006] 4 SLR 745, CA (refd)

Ng Sing King and others v PSA International Pte Ltd and others (No 2) [2005] 2 SLR 56, HC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)

Over & Over Ltd v Bonvests Holdings Ltd and another [2010] 2 SLR 776, CA (refd)

Sam Weller & Sons Ltd, Re [1990] BCLC 80 (refd)

Scottish Co-operative Wholesale Society Ltd v Meyer [1958] 3 All ER 66, HL (refd)

Wayde & Anor v New South Wales Rugby League Ltd (1985) 10 ACLR 87; (1985) 59 AJLR 798, HC (refd)

Legislation referred to

Companies Act 1965 ss 132E, 132E(1), (6), 181, 181(2)
Companies Act [SG] s 216
Corporations Act 2001 [AU] s 260
Rules of the High Court 1980 Form 43

Chris Thian (Chris Thian & Co) for the petitioner.
George Aludah (Aludah & Co) for the respondents.

Abdul Rahman Sebli J:

THE APPLICATION

[1] This is an application by the petitioner under s 181 of the Companies Act 1965 ('the Act') for the following orders:

(a) cancellation of all resolutions passed at the Board of Director's ('BOD') meeting of the first respondent company held on 24 September 2010;

(b) cancellation of all resolutions passed at the extra ordinary general meeting ('EGM') of the first respondent company held on 11 October 2010;

(c) the second, third, fourth, fifth and eighth respondents and each of them to purchase the petitioner's entire interest in the first respondent company upon such terms and conditions as the court deem just; and

(d) alternative to prayer (3) above, for orders of winding up to be made by the court including specific directions for the appointment of a qualified independent liquidator to properly investigate into the conduct of the second, third, fourth, fifth, sixth, seventh and eighth respondents in the affairs of the first respondent company and to commence appropriate action against the said second, third, fourth, fifth, sixth, seventh and

eighth respondents.

THE PETITIONER'S GRIEVANCE

[2] The petitioner's grievance being one of the directors and minority shareholder of the first respondent company is that the relevant respondents who are from one family had caused the first respondent company to enter into an unfavourable settlement agreement with their (respondents) family owned company known as Century Leasing & Development Sdn Bhd ('CLDSB') to settle a short term loan granted by CLDSB to the first respondent company in the sum of RM13,077,906.70 inclusive of interest. The repayment was done by way of transferring to CLDSB three blocks of a three-storey shoplots belonging to the first respondent company.

THE FACTS

[3] Having regard to the issues involved it is necessary to lay down the facts in some detail. They are as follows. The first respondent company, a property development company based in Kota Kinabalu is essentially a company owned and managed by the Lim family of which the patriarch is Lim Shoon Kok (the second respondent). The fourth, fifth, sixth and seventh respondents are the children of the second respondent. The directors of the first respondent company are the second, fourth, sixth respondents and the petitioner himself while the shareholders and their shareholdings are as follows:

(a) the second respondent (10% share);

(b) the third respondent (40% share);

(c) the fourth respondent (10% share);

(d) the fifth respondent (10% share);

(e) the eighth respondent (10% share); and

(f) the petitioner (10% share).

[4] The directors of CLDSB on the other hand are the second and sixth respondents while its shareholders are the second and third respondents. 47% of the shares in CLDSB are owned by the Lim family. Like CLDSB the third respondent company is also 100% owned by the Lim family. The directors are the second respondent, the second respondent's wife Tan Kim Gek, the second respondent's daughter Lim Tan Cheng and the seventh respondent. The shareholders are the second respondent, his wife Tan Kim Gek, his sons the fourth and fifth respondents respectively, his daughters the sixth and seventh respondents respectively and another daughter Lim Tan Quee. It is thus plain that the first respondent company is 90% owned by the Lim family.

[5] How did the petitioner come to be involved in the first respondent company, a company controlled by the Lim family? The unchallenged evidence of the petitioner is that sometime in 2002 he was approached by the second respondent who on behalf of the first respondent company offered him to take up its shares and also to appoint him as a director. The condition for the offer to take up the shares was that they were to be accepted only if the petitioner could succeed in assisting the first respondent company to revive a joint venture agreement entered into between Lembaga Pembangunan Perumahan Dan Bandar ('LPPB') and the first respondent company dated 23 December 1994. The petitioner's evidence is that the second respondent came alone to see him on the conditional invitation.

[6] In his testimony the fourth respondent denied that this offer was ever made but having regard to the fact that he was not present when the petitioner and the second respondent met, no weight should be given to his bare denial. I accept the petitioner's unchallenged version of events on this point. The fact that he signed the supplementary agreement with LPPB on behalf of the first respondent company lends credence to his testimony that he was instrumental in reviving the project after being invited to do so by the second respondent, not that his evidence requires corroboration. In any event it is the second respondent, and not the fourth respondent who would be the best person to contradict the petitioner but he was not called to give evidence.

[7] The joint venture agreement between LPPB and the first respondent company pertains to a project comprising 99 units of shoplots at Kuala Menggatal which were to be constructed in three phases by the first respondent company on two pieces of land belonging to LPPB. The financing of the project was to be borne solely by the first respondent company but the agreement was that upon completion of the same, the first respondent company was entitled to keep the sale proceeds from the 99 units after paying a specified percentage of the sales revenue to LPPB.

[8] The petitioner succeeded in reviving the joint venture agreement and it is an unchallenged fact that the success was purely due to his effort. This led to the signing of a supplementary agreement dated 26 January 2005 between LPPB and the first respondent company and the project took off. Thereafter the petitioner duly acquired and paid for 100,000 shares in the first respondent company for the sum of RM230,000. He was also duly appointed as a director because his services were required to oversee the running of the revived project.

[9] Prior to the petitioner's involvement in the first respondent company, the company had earlier been granted a bridging facility by Malayan Banking Bhd to complete all three phases of the project. Phases 1 and 2 were completed sometime in 1982. As for phase 3, the first respondent company decided not to

drawdown the allocated tranche. Instead the first respondent company obtained a short term loan of RM8m from CLDSB to finance construction of phase 3. This was because the rate of interest charged by CLDSB was 1% lower than Maybank's bridging facility. At the time of the filing of this petition, construction of phase 3 of the project was ongoing and by early January 2011 the three blocks of shoplots were already put up for rent.

[10] Sometime in the middle of 2010, the second respondent decided that he wanted to buy the entire phase 3 project from the first respondent company at the price of RM24m. The petitioner opposed this move as the price of RM24m represented only RM630,000 per unit of the shoplots when the market value was around RM750,000 per unit. The petitioner's request is that if there is to be any form of fair or conscionable buy-back of phase 3, the shoplots should first be offered for sale to all the shareholders according to their shareholding ratio. Alternatively, the petitioner requested that if the second respondent or the Lim family insists on buying the entire phase 3, then each of them should buy-out his shares at RM1.3m to be paid in cash or in kind from the properties in phase 3. The second defendant however was only agreeable to buy-out the petitioner's shares at RM660,000 and not RM1.3m. The petitioner would not agree to this price, based as it was on the aggregate undervalued price of RM24m for the phase 3 properties.

[11] In an apparent move to subterfuge the petitioner's intransigence, the second, third and sixth respondents held a BOD meeting of the first respondent company on 23 September 2010. Agenda 1 of the meeting was the following:

> To consider the settlement of short-term loan and interest which have been overdue and default in payment by the Company to Century Leasing & Development Sdn Bhd.

[12] The petitioner was not present at the meeting as he was away overseas. What transpired at the meeting was that the respondent directors represented that they needed another RM5m loan from CLDSB as working capital, thus increasing CLDSB's loan to the first respondent company from RM8m to RM13m. The director respondents then resolved to propose to CLDSB to accept Blocks J, K and L of phase 3 of the project, which they valued at approximately RM13m, as settlement of the CLDSB aggregate loan of RM13 million. The minutes of the meeting also state that the resolution was subject to a valuation report and on the assumption that CLDSB would approve the grant of the additional RM5m loan and accept the proposal of the first respondent company that settlement of the loan would be by way of selling the

three blocks of shoplots to CLDSB at the price of RM13m. In other words settlement of the RM13m loan was to be by way of 'contra' with the three blocks of shoplots.

[13] According to the petitioners the second, fourth and sixth respondents (directors) knew that he would be overseas between 20 September 2010 and 25 September 2010 and further knew that he had not been duly notified of the BOD meeting, yet they proceeded with the meeting. In this regard I have no reason to disbelieve the petitioner's evidence that the notice calling for the meeting dated 15 September 2010 was only brought to his attention upon his return on 27 September 2010, by which time a decision had been made to authorise the shareholders to authorise the directors to cause the first respondent company to enter into the settlement agreement with CLDSB to settle the short term loan of RM13,077,906.70. I reject the fifth respondent's (secretary of the first respondent company) claim that the notice was distributed to all the directors on 15 September 2010. It is obvious from his answers in cross-examination that he was clueless as to whether the notice had in fact been distributed on 15 September 2010.

[14] By his letter to the first respondent dated 27 September 2010 the petitioner voiced out his objection to the convening of the BOD meeting on 23 September 2010 and requested that another meeting be convened in 220 order for the matter to be deliberated and for his views to be heard. His objection was twofold, namely:

(a) the hasty disposal of the phase 3 shoplots to CLDSB at an undervalued price of RM24m was totally unjustifiable; and

(b) the disposal of the phase 3 shoplots was to CLDSB, a company linked to the directors and shareholders of the first respondent company who are interested parties and who were therefore not entitled to cast their votes without contravening the Act.

[15] The petitioner's request was rejected by the respondents vide letter dated 1 October 2010. The first respondent company then went ahead with an extra ordinary general meeting ('the EGM') on 11 October 2010 and passed the resolution tabled at the meeting. The first respondent company's shareholders who were present at the meeting were the fourth, fifth and eighth respondents. The second respondent was not present but his daughter Lim Tan Ting ('sixth respondent') who is also a director of CLDSB voted as proxy for her father. As for the third respondent company shareholder the second respondent's daughter Lim Tan Cheng ('seventh respondent') voted as the corporate representative for the third respondent.

[16] After repeated requests by the petitioner for the minutes of the EGM

held on 11 October 2010, a copy was eventually given to him towards the end of October 2010. From the minutes it is clear that the respondents did not declare their interest in CLDSB. The petitioner discovered that many of the items stated in the minutes were contrived and some were not even discussed. The minutes also referred to a valuation report dated 28 September 2010 prepared by JS Valuers Property Consultants Sdn Bhd ('JS Valuers') which the relevant respondents relied on to come up with the approximate value of RM13m for the three blocks of shoplots. In the minutes it was also disclosed that the reason given for not being able to raise finance by selling the shoplots to the public was because approval of the resubmitted plans was still pending and that consequently they had no choice but to repay the RM13m to CLDSB by way of contra with the shoplots.

[17] The petitioner then wrote a letter dated 1 November 2010 to the first respondent company and the other respondent shareholders explaining his objection to the minutes of the EGM dated 11 October 2010 and requested for another EGM to be held to reconsider the matter and to have the votes of the interested parties cast aside. In the letter the petitioner again highlighted the following:

(a) the relevant respondents did not declare their interest in CLDSB and their failure to do so was a contravention of the Act;

(b) in view of their interest in CLDSB, the relevant respondents were also not supposed to vote in the EGM and that by doing so they were in contravention of the Act;

(c) JS Valuers failed to take into consideration the prices of equivalent shop houses that have been sold in the secondary market and therefore another valuation by Messrs Henry Butcher should be made; and

(d) the inability to sell the three shoplots to members of the public is not true.

[18] The petitioner's request was rejected by the fourth respondent vide letter dated 8 November 2010, telling the petitioner that 'all the shareholders had gone through the agenda of the EGM and the ordinary resolution had been approved on the matter'. In response the petitioner wrote a letter through his solicitor dated 16 November 2010 requesting the first respondent and the other directors and shareholders to reconsider their position on the resolutions passed and to enter into a negotiation for a buy-out of his interest in the first respondent company. The fourth respondent asked to be given about two weeks for him and the rest of the shareholders to come up with an offer. He never came back with an offer.

[19] There can be no argument that the JS Valuers report was crucial for any decision on the sale price of the three blocks of shoplots, yet it was only made

available on the day of the EGM and was promptly removed after the meeting. The petitioner on five occasions asked for the report but was denied by the respondents. It was only after the petitioner's solicitor served a notice in Form 43 of the Rules of the High Court on the respondents' solicitors that the respondents relented and the report was made available in March 2011, five months after the EGM was held. In my view this conduct on the part of the respondents is clear evidence of an attempt to hide a wrongdoing.

THE AVAILABLE REMEDY

[20] Section 181 of the Act provides as follows:

(1) Any member or holder of a debenture of a company or, in the case of a declared company under IX, the Minister, may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matter complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the Order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

[21] This provision may be invoked where there is 'oppression' of a member or holder of a debenture of a company or where a member's interest is disregarded. It may also be invoked where there is a resolution or act that 'unfairly discriminates' against or is 'otherwise prejudicial' to a member. By its very nature, it is contentious. As such an application seeking remedies should

set out the acts of oppression complained of. This can be achieved by the originating petition procedure: see *Re Lee Mah Realty Sdn Bhd; Song Kueng Poh v Liew Chock Sang & Ors* [1980] 1 MLJ 115.

[22] In order to succeed in this petition the petitioner must prove the following:

(a) that he is a member of the first respondent company; and

(b) that the affairs of the first respondent company had been conducted or the powers of the directors had been exercised in a manner that was:

(i) oppressive to the petitioner; or

(ii) in disregard of the petitioner's interest; or

(iii) that some act of the first respondent company or any resolution passed by the respondent directors unfairly discriminated against the petitioner; or

(iv) it was otherwise prejudicial to the petitioner.

THE PRINCIPLES

[23] There is no dispute that being a registered shareholder the petitioner is a member of the first respondent company. The question is whether the respondents, as the operative majority of the directors and shareholders of the first respondent company had acted oppressively or in disregard of the petitioner's interest, warranting relief under s 181(2) of the Act. The expressions 'oppression' and 'disregard of interest' were explained by the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 in the following terms (per Lord Wilberforce):

> Secondly, for the case to be brought within s 181(1)(a) at all, the complainant must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* 1952 SC 49: Their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v*

Drysdale 1925 SC 311 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

[24] In *Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR 745 the Singapore Court of Appeal in dealing with s 216 of the Singapore Companies Act which is equivalent to s 181 of the Act said:

> Section 216 of the Companies Act was conceived and passed with the objective of protecting minority shareholders from majority abuse. In order to offer effective and comprehensive protection, s 216 confers on the courts a flexible jurisdiction to do justice and to address unfairness and inequity in corporate affairs. The court may be said to be empowered under s 216 of the Companies Act to relay the boundaries of what is or is not fair as between corporate participants.

[25] The court in the same judgment made the following observation with regard to the participation of family members in the meetings:

> Although ordinarily a member is entitled to vote as he pleases in his own interest, in this instance, to avoid any allegation of oppressive conduct, Mdm Halim and the shareholders who had family ties to her should have disqualified themselves from attending those crucial meetings and voting on the proposals.

[26] In *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 the English Court of Appeal defined oppression in the following terms:

> In our judgment, oppression occurs when shareholders, having a dominant power in the company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair to the other members of the company or some of them, and lacks the degree of probity which they are entitled to expect in the conduct of the company's affairs;

[27] The circumstances under which oppression or disregard may arise are infinite. The litmus test in each case is whether there is a visible departure from fair dealing and a violation of the conditions of fairplay: *Ng Sing King and others v PSA International Pte Ltd and others (No 2)* [2005] 2 SLR 56. In *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 the Singapore Court of Appeal cited with approval the following passage in an article by Margaret Chew in her book *Minority Shareholders' Rights and Remedies* (LexixNexis (2nd Ed), 2007):

> The expressions in the Singapore, Malaysian, UK and Australian provisions — 'oppression', 'disregard of interests' (or 'contrary to interests), 'unfair discrimination' and 'prejudice' (or 'unfair prejudice') — all point toward behaviour on the part of the majority shareholders or the controllers of a company that departs from the standards of fair play amongst commercial parties.

[28] The test of unfairness is an objective one: see *Wayde & Anor v New South Wales Rugby League Ltd* (1985) 10 ACLR 87; (1985) 59 AJLR 798 where Brennan J said:

> The test of unfairness is objective … and it assumes that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose and address their minds to the question whether a proposed decision is unfair. The court must determine whether reasonable directors possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision.

FINDING ON OPPRESSION AND DISREGARD OF INTERESTS

[29] This is primarily a question of fact As Gopal Sri Ram JCA (as he then was) said in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at p 129:

> It is important to emphasize that much of what Lord Wilberforce said in his advice were mere guidelines and not inflexible propositions of law: for, the question whether there was oppression or disregard or unfair discrimination or whether the conduct complained of was 'otherwise prejudicial' is one that must eminently be determined according to the facts of each particular case.

[30] Having regard to the surrounding circumstances leading to the passing of the resolutions on 23 September 2010 and 11 October 2010 it is plain and obvious that the real reason why the respondents acted the way they did was to deny the petitioner the right to voice his objections to the intended sale of the three blocks of shoplots to CLDSB at an undervalue. The main excuse given for the big rush was that CLDSB had issued a notice of demand for repayment of the short term loan granted to the first respondent company. Agenda 1 of the minutes of the BOD meeting held on 23 September 2010 states as follows:

> The Company has received from Century Leasing & Development Sdn Bhd ('CLDSB'), the lender, the Notice of demand for full settlement of the short-term loan and interest amounting to RM8,077,906.70 as at August 2010 due to the Company has defaulted the repayment of part of the loan amounting to RM3,000,000.00 on 20th June 2010.

[31] Since the decision to dispose off the phase 3 shoplots was predicated on the alleged demand by CLDSB, it therefore falls to be determined if indeed there was such a demand by CLDSB. In this regard the petitioner's unequivocal and unchallenged evidence is that there was no such letter of demand. The respondents have not produced any notice of demand by CLDSB, nor any document whatsoever to prove that there was such a demand. This is odd because the evidence of the fourth respondent is that CLDSB demanded repayment of the loan three times, ie in July, August and September 2010 respectively. If indeed there had been such demands by CLDSB surely the respondents would have written proof of the demands. But none was produced at the trial. The respondents' failure to produce the notice of demand can only mean that if produced the alleged notice or notices would be unfavourable to the respondents. In the absence of evidence to the contrary I accept the petitioner's evidence that no notice of demand was ever issued by CLDSB for repayment of the RM13m loan.

[32] Since CLDSB never issued any notice of demand for repayment of the loan, there was therefore no urgency for the respondents to call the BOD meeting on 23 September 2010, followed by the EGM on 11 October 2010. The meeting should have been postponed to wait for the petitioner to return from his overseas trip. Surely, being a fellow director his views on the disposal of the company's assets were important I am inclined to believe that the move was engineered to enable the respondents to quickly dispose off the first respondent company's assets at an undervalue without regard for the petitioner's interest. It is clear that the respondents had no desire to hear the petitioner's views on any alternative mode of settling the loan.

[33] Being a company wholly owned by the Lim family, CLDSB would not in the ordinary course of business have called on the loan given to the first respondent company, a company also almost entirely owned by the Lim family unless there was an ulterior motive. I am unable to accept Mr Aludah's argument that the decision by the respondents not to agree with the petitioner's proposal was a mere disagreement over the manner a business transaction was to be carried out and that it does not amount to oppression or disregard.

[34] By not disqualifying themselves and casting their votes at the EGM the relevant respondents had in fact contravened s 132E(6) of the Act, which provides as follows:

> (6) A director or substantial shareholder of a company or its holding company, or a person connected with such director or substantial shareholder, in whose favour the company carries into effect an arrangement or transaction and who knows that such arrangement or transaction is carried into effect by a company in contravention of this section, or a director who knowingly authorized the company to carry into effect such arrangement or transaction, in contravention of this section, shall be

guilty of an offence against this Act Penalty: Imprisonment for seven years or two hundred and fifty thousand ringgit or both.

[35] There is a general principle of law that when unlawfulness is present, the court would be more ready to find an act prejudicial, unfair and contrary to the interest of the members: see *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* (1993) 10 ACSR 489; (1993) TASSC 36, a case on s 260 of the Australian Corporations Act which is also equivalent to s 181 of the Act. The operative part of s 132E of the Act is sub-s 132E(1) which stipulates:

> (1)Subject to sub-s (2) and s 132F, a company shall not carry into effect any arrangement or transaction where a director or a substantial shareholder of the company or its holding company, or a person connected with such a director or substantial shareholder —
>
> (a) acquires or is to acquire shares or non-cash assets of the requisite value, from the company; or
>
> (b) disposes of or is to dispose of shares or non-cash assets of the requisite value, to the company.

[36] In the instant case the prohibited act is the acquisition by CLDSB of the three blocks of shoplots belonging to the first respondent company. No dispute can arise as to the fact that the relevant respondents are connected to CLDSB. The company is owned by the respondents and their nuclear family. The only two shareholders of CLDSB are the second respondent and the third respondent and, as we now know, the third respondent company is also owned by the Lim family. By these close ties they are clearly caught by s 132E of the Act. They should not therefore have voted at the EGM. Indeed the fiourth respondent candidly admitted in cross examination that they consciously flouted s 132E even though they knew that it was a criminal offence to do so.

[37] Was there basis for the respondents to fix the value of the shoplots at approximately RM13m? The petitioner is adamant that the figure is a concoction. As for the JS Valuers report on which the price of RM13m was based, the petitioner has countered the report by producing a valuation report prepared by Messrs Henry Butcher Malaysia ('Henry Butcher'). Having considered the two reports and the oral testimony of the maker of the report, namely Mr Liew Shun Thyam (PW2), I have no hesitation in preferring the Henry Butcher report as it painstakingly explains, with many comparables, how it came to the conclusion that the market value of one intermediate unit is RM740,000 whilst the corner unit is RM855,000. PW2's testimony reveals the weaknesses and flaws in the JS Valuers report, indicating an undervaluation.

[38] The valuation by JS Valuers was stated to have been carried out on 27

September 2010. This was three clear days after the BOD meeting on 23 September 2010. Yet by a strange twist of coincidence the value arrived at in the report matched the price of the shoplots decided at the BOD meeting three days earlier. According to PW2 although JS Valuers had used three sales comparables, there were no details or workings as to how they arrived at the market value. PW2's evidence on this point was not challenged at all and neither did the respondents call the maker of the JS Valuers report to refute PW2's testimony. Expert evidence must be challenged by another expert. In the absence of challenge the oral testimony of PW2 demolishes the valuation made by JS Valuers in its report.

[39] The fourth respondent, being a former registered valuer himself admitted that he was aware that very little and outdated comparables are shown in the JS Valuers report. He went on to agree that such outdated comparables would render a valuation inaccurate. The fourth respondent's admission shows that the respondents knew or had reason to believe that the price of the three blocks of shoplot as determined by JS Valuers was an undervalue. That naturally raises the question as to why they agreed to sell the phase 3 shoplots to CLDSB at an undervalue. The inescapable inference that can be drawn is that the price of RM13m had been predetermined by the respondents and that JS Valuers were instructed to prepare a valuation based on the predetermined figure. This in my view is an act of oppression and in disregard of the petitioner's interest, bearing in mind any disposal of the first respondent company's assets at an undervalue would affect the dividends of the shareholders, as admitted by the fourth respondent himself.

[40] The respondents cannot deny that they and their family benefitted from the undervalued disposal of the shoplots to CLDSB. Disposing of one's company's assets to another company as a means of settling an outstanding loan owing to the other company is not a matter to be taken lightly. Business logic dictates that the debtor company would naturally want the market value of the company's assets to be valued as high as possible so that the outstanding loan owing could be offset as much as possible. In the absence of valid explanation, any act to the contrary would prima facie be indicative of oppression or disregard of interest. Being the majority shareholders (90% share) of the first respondent company, the Lim family has the right to decide on what is best for the company but where that right is exercised oppressively or without regard for the interest of the minority shareholder the court will come to his aid.

[41] Can the respondents be heard to say that they too suffered as shareholders if the shoplots were disposed of to CLDSB at an undervalue? In this regard it is apt to refer to the judgment of Peter Gibson J in *Re Sam Weller & Sons Ltd* [1990] BCLC 80, where it was held:

> The word 'interest in s 459(1) was wider than that of 'rights' and its use suggested that Parliament recognised that members of a company could have different interests even though they shared the same rights. Coupled with this, the use of the adverb 'unfairly' introduced the wide concept of fairness in relation to the prejudice of the interests of a member. *Accordingly, even if the rights of all the members were affected equally by the allegedly unfairly prejudicial conduct, the interests of some part of the members may be affected in a way that was unfairly prejudicial to them.* (Emphasis added.)

[42] What about the respondents' argument that they could not sell the shoplots due to the fact that the resubmitted amended plans were pending approval by the authorities? Having regard to the evidence, I find no truth in this assertion. There was a similar resubmission of the amended plans with regard to phase 2 of the project but phase 2 was sold to the buyers even before approval was given to the amended plans. Further, construction of phase 3 was not halted or suspended pending approval of the resubmitted amended plans. On the contrary, construction of phase 3 continued and proceeded based on the amended plans.

[43] If indeed approval is a prerequisite for sale to the public, it would have been foolish to proceed with the phase 3 construction. The petitioner's evidence is that there is absolutely no basis to withhold sale to the public on the ground of non approval of the amended development and building plans. According to him these amendments were merely technical amendments which could be complied with and approved easily. This part of the petitioner's evidence was not challenged at all in cross examination, which means it is deemed to be accepted as the truth.

[44] The respondents' reason for the 'cannot sell' argument is therefore a ruse and a lame excuse for not offering the phase 3 shoplots for sale to the public. I reject the respondents' alleged reason that there was no other way to repay CLDSB's outstanding loan except by way of contra with the three blocks of shoplots. I accept the petitioner's evidence that the real reason why the phase 3 shoplots were not sold to the public was because the relevant respondents including himself intended to keep (and not sell) the phase 3 shoplots for investment reasons and that what he did not forsee was the respondents' eventual reliance on the purported repayment of the short term loans to CLDSB as an excuse to transfer and sell the shoplots at an undervalue.

THE RESPONDENTS CANNOT HIDE BEHIND CORPORATE VEIL

[45] As CLDSB is wholly owned by the respondents they cannot hide behind the corporate veil. The courts do not take a narrow and legalistic view of the separate personalities involved. In *Scottish Co-operative Wholesale Society*

Ltd v Meyer [1958] 3 All ER 66, a society was formed as a company. It was argued that it was the society who acted in an oppressive manner, and not the company. The House of Lords (per Viscount Simonds LJ) dismissed the argument and held as follows at p 71:

> In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.

[46] In *Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors and other appeals* [1995] 2 SLR 297, it was similarly argued that the affairs of the parent company were not carried out in an oppressive manner since it was the subsidiary company that was in the wrong. This was how the Singapore Court of Appeal dealt with the argument:

> Counsel for the appellants urged on us that there is a whole line of personalities involved, such as in the present case, there is a danger in blurring the line and equating the acts of one with the acts of all. There would be a difficulty of knowing where to stop, as in a situation involving a parent company and its subsidiaries, and one can always say, as the learned judge did, that the subsidiary is a vehicle of the parent. This is a forceful argument, but it seems to us that these are questions of fact to be assessed by the court. Certainly, not all subsidiaries are mere vehicles of their parent company. However subsidiaries come in all shapes and sizes; some are truly independent, while others are not In this case, KPM had been used by Low as a mere vehicle of KZ.

CONCLUSION

[47] It is clear to me that the relevant respondents who were the majority shareholders in the first respondent company had advanced their own interests and had abused their voting powers to the prejudice of the petitioner in disposing off the company's assets to CLDSB. In the circumstances and pursuant to s 181(2) of the Act, I made the following orders against the respondents:

(a) that all resolutions passed at the BOD meeting dated 24 september 2010 be revoked, set aside and cancelled;

(b) that all resolutions passed at the EGM dated 11 October 2010 held on 11 October 2010 be revoked, set aside and cancelled;

(c) that the settlement agreement entered into between the first respondent company and CLDSB and any document whatsoever effecting transfer

of the legal and beneficial interest in the first respondent's assets, in particular Blocks J, K and L to CLDSB be revoked and set aside;

(d) that the second, third, fourth, fifth and eighth respondents and each of them to purchase the petitioner's entire shares in the first respondent company;

(e) that a valuer from a firm of public accountants be appointed within 30 days jointly by the petitioner and the second, fourth and fifth respondents failing which an inquiry shall be held before this court within 14 days of the expiry of the 30 days for such appointment;

(f) that the date of valuation of the shares be the date of this order and that valuation is to take into account the market value of the first respondent company's net assets including but not limited to Blocks J, K and L and any unsold shoplots falling within the project;

(g) that the sale and purchase of the petitioner's shares in the first respondent's company be completed within 60 days from the date of valuation; and

(h) that costs of this action, including any cost resulting from the consequential orders made, in particular the cost of appointing an independent valuer to be borne jointly and severally by the second to the eighth respondents.

Application allowed with costs.

Reported by Kanesh Sundrum